109-122

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 76.

HENRY NEWMAN, PLAINTIFF IN ERROR,

vs.

CHESTER A. ARTHUR, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 8, 1880.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Henry Newman, plaintiff, and Chester A. Arthur, defendant, a manifest error hath happened to the great damage of the said Henry Newman, as by his complaint appear', we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the fourth Monday of October, eighteen hundred and eighty, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 18th day of September, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

The foregoing writ is hereby allowed.

N. Y., September 18, 1880.

SAM'L BLATCHFORD.

2 (Indorsed:) E. & A. A. 303. 4671. U. S. Supreme Court. Henry Newman, plaintiff in error, against Chester A. Arthur, defendant in error. Original writ of error. Stanley, Brown & Clarke, pl'ff's att'ys, 195 B'way. (Stamp:) U. S. circuit court. Filed Sep. 24, 1880. John I Davenport, clerk.

Due service of a copy of the within is hereby admitted.

N. Y., Sept. 24, 1880.

STEWART L. WOODFORD,
U. S. Attorney, Att'y for Def't.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Joseph M. Deuel, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do

3 hereby certify that the following pages, numbered from four to forty-six inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Henry Newman, plaintiff in error, against Chester A. Arthur, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New

York, in the second circuit, this sixth day of October, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the said United States the one hundred and fifth.

[SEAL.] J. M. DEUEL, *Clerk.*

4 *Summons.*

Superior court of the city of New York.

HENRY NEWMAN, PLAINTIFF,
against
CHESTER A. ARTHUR, DEFENDANT.

To the defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the superior court of the city of New York, at the court-house in said city, and to serve a copy of your answer to the said complaint on the subscribers, at their office, at No. 16 Wall street, in said city, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiffs in this action will apply to the court for the relief demanded in the complaint.

Dated New York, Feb. 3rd, 1876.

STANLEY, BROWN & CLARK,
Plaintiff's Attorneys, 16 Wall St,

5 (Indorsed:) N. Y. superior court. Henry Newman, plaintiff, against Chester A. Arthur, defendant. Summons to Chester A. Arthur. Stanley, Brown & Clarke, plaintiff's attorneys, 16 Wall st., New York. Rec'd Feb'y 3, '76.

6 The President of the United States of America to the judges of the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Chester A. Arthur, defendant, by Henry Newman, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the first day of May, 1876, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the 20th day of April, in the year one thousand eight hundred and seventy-six.

[L. S.] JOHN I. DAVENPORT, *Clerk.*

STEWART L. WOODFORD,
Defendant's Attorney.

7 (Indorsed:) U. S. circuit court. Chester A. Arthur ads. H. Newman. Copy certiorari. George Bliss, defendant's attorney.

SIR: Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York.

New York, April 20, 1876.

Yours, &c.,

GEORGE BLISS,
Defendant's Attorney.

Due service of a copy of the within and of the above notice is hereby admitted.

New York, April 20, 1876.

STANLEY, BROWN & CLARKE,
Plaintiff's Attorneys.

8 THE UNITED STATES OF AMERICA:

Circuit court of the United States for the Southern District of New York, in the second circuit, of the October term, in the year one thousand eight hundred and seventy-six.

HENRY NEWMAN }
vs. }
CHESTER A. ARTHUR. }

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry Newman, plaintiff in this suit, comes into court and by Stanley, Brown & Clarke, his attorneys, gives the court now here to be informed that heretofore, to wit, on the 3rd day of February last past, this action was commenced in the superior court of the city of New York, according to the laws of the State of New York, and the rules and practice of said court, in favor of the said plaintiff against the defendant herein, upon the causes of action hereinafter set forth, and the summons therein filed with the clerk of said court. That the defendant afterwards, by his attorney, George Bliss, esquire, duly appeared in said action, and thereupon on the 1st day of May, in the year one thousand eight hundred and seventy-six, the said action was duly removed by writ of certiorari for further prosecution in this court, according to the act of Congress in such case made and provided; and the clerk of the said court did thereupon return the said writ with the said summons, and duly file the same in this court, which allegations the defendant admits to be true.

Wherefore let the further proceedings and trial in this action be continued in this court.

And the said plaintiff, by his said attorneys, complains of said defendant of a plea of trespass on the case for promises; for that, whereas said defendant on the 3rd day of February, eighteen hundred and seventy-six, at New York City, in the district aforesaid, was indebted to said plaintiff in the sum of five thousand and $\frac{}{100}$ dollars, lawful money of the United States of America, for duties on merchandise, to wit, Italian cloths, imported into and entered at the collection district of the United States for the city of New York on or about the 3rd day of August, 1875, and at divers other times thereafter between that day and the 8th day of December, in the year one thousand eight hundred and seventy-five, in the fol-

lowing vessels, to wit: The Russia, the Scythia, and others, from Liverpool, unlawfully demanded, exacted, and received, at said New York City by the said defendant, then collector of the customs for said district, under color of a law of the United States for the collection of duties on imports, and paid by the said plaintiff under protest and appeal in writing in due form of law.

And being so indebted he, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money when he, said defendant, should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, was indebted to the said plaintiff in the further sum of five thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by said plaintiff to said defendant, and at the special instance and request of the said defendant; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the like request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiff. And being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in this count mentioned when he should be thereunto afterwards requested.

Nevertheless, said defendant (although often afterwards requested so to do) has not paid said sums of money or any or either of them or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff has hitherto refused, and still does refuse, to the damage of the said plaintiff of ten thousand dollars, and therefore the said plaintiff brings suit, &c.

STANLEY, BROWN & CLARKE,
Attorneys for the Plaintiff.

9 (Indorsed:) U. S. circuit court. Henry Newman vs. Chester A. Arthur. Declaration.

To GEORGE BLISS, Esq.,
Def't's Att'y:

SIR: Please take notice that a rule has been entered in the book of common rules in the office of the clerk of this court, at the city of New York, requiring the defendant to plead to the declaration in twenty days after service of a copy thereof and notice of said rule on his attorney, or judgment, &c.

New York, Dec. 5, 1876.

STANLEY, BROWN & CLARKE,
Attorneys for Plaintiffs, 16 *Wall street.*

Received Dec. 5, 1876. U. S. attorney's office.

10 Supreme court, city of New York.

HENRY NEWMAN, PL'FF,
against
CHESTER A. ARTHUR, COLLECTOR OF THE Customs of the United States at the port of New York. } Bill of particulars.

SIR: Please to take notice that the following is the bill of particulars of items of the plaintiff's demand in the above-entitled action, to wit, moneys exacted by compulsion and duress, and under color of the revenue laws of the United States, by the defendant as collector, as aforesaid, from and paid by the plaintiffs on merchandise imported by the plaintiffs, as per schedule hereto annexed, with legal interest on said amount from the date of payment thereof, as aforesaid.

Dated New York, M'ch 16th, 1876.

Yours, &c.,

STANLEY, BROWN & CLARKE,
Plaintiff's Attorneys, No. 16 Wall Street, New York.

To GEO. BLISS, Esq.,
Defendant's Attorney.

Importer, Henry Newman.

	Description of merchandise.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty paid in excess.	Date of payment of duty.	Date of filing protest.	Date of appeal to Secretary of the Treasury.	Date of answer of the Secretary of the Treasury.
1	Cotton, Italians	Liverpool	Russia	July 14, 1875	Aug. 3, 1875	$147 27	Dec. 23, 1875			
2	" "	"	Scythia	Aug. 12, 1875	" 25, 1875	312 46	Jan'y 19, 1876	Aug. 14, 1875	Aug. 14, 1875	Sept. 29, 1875
3	" "	"	"	" 12, 1875	" 25, 1875	303 39	Sept. 15, 1875	Sept. 27, 1875	Sept. 27, 1875	Nov. 22, 1875
4	" "	"	Russia	" 19, 1875	" 30, 1875	212 21	Aug. 25, 1875	" 7, 1875	" 7, 1875	" 22, 1875
5	" "	"	City of Brussels	" 23, 1875	Sept. 7, 1875	62 70	Oct. 5, 1875	" 27, 1875	" 27, 1875	" 22, 1875
6	" "	"	Baltic	Sept. 21, 1875	Oct. 5, 1875	140 39	Sept. 7, 1875	" 27, 1875	" 27, 1875	" 22, 1875
7	" "	"	Russia	" 23, 1875	" 8, 1875	688 48	Oct. 22, 1875 " 25, 1875 " 29,	Nov. 4, 1875	Nov. 4, 1875	Jan'y 13, 1875
8	" "	"	Bothnia	" 29, 1875	" 14, 1875	216 39	Nov. 3, 1875 " 15, 1875	" 4, 1875	" 4, 1875	" 13, 1875
9	" "	"	Adriatic	Oct. 20, 1875	Nov. 1, 1875	235 78	Oct. 15, 1875 Nov. 3, 1875	" 4, 1875	" 4, 1875	Dec. 15, 1875
10	" "	"	Germanic	Nov. 9, 1875	" 23, 1875	236 91	Dec. 18, 1875	" 17, 1875	" 17, 1875	Feb. 1, 1876
11	" "	"	Celtic	" 15, 1875	Dec. 6, 1875	420 83	Nov. 30, 1875	Dec. 4, 1875	Dec. 4, 1875	Jan'y 13, 1875
12							Dec. 7, 1875	" 28, 1875	" 28, 1875	Feb'y 1, 1876
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12 (Bill of particulars endorsed:) N. Y. superior court. Henry Newman, pl'ff, against Chester A. Arthur, collector of the customs of the United States at the port of New York. Bill of particulars. Stanley, Brown & Clarke, attorneys for plaintiff, No. 16 Wall st., N. Y. To Geo. Bliss, esq., def't's att'y.

13 *Plea.*

United States circuit court, southern district of New York.

CHESTER A. ARTHUR
ads.
HENRY NEWMAN.

And the said defendant, Chester A. Arthur, by George Bliss, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not undertake and promise in manner and form, as the said plaintiff in this suit has above thereof declared, against the said defendant, and of this he puts himself upon the country, and the said plaintiff does the like, etc.

GEORGE BLISS,
Defendant's Attorney.

To STANLEY, B. & C., Esq.,
Plaintiff's Attorney'.

14 (Indorsed:) U. S. circuit court. Chester A. Arthur ads. H. Newman. Plea. George Bliss, attorney for defendant.
Due service of a copy of the within is hereby admitted.
New York, Dec. 6, 1876.

STANLEY, BROWN & CLARKE.

You will please take notice, that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York.
New York, Dec. 6th, 1876.
Yours, etc.,

GEORGE BLISS,
United States Attorney for Defendant.

To STANLEY, B. & C.,
Plaintiff's Attorney'.

15 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday the 21st day of January, in the year of our Lord one thousand eight hundred and eighty.
Present, the honorable Nathaniel Shipman, judge.

HENRY NEWMAN
vs. } 4671.
CHESTER A. ARTHUR.

This case being still on trial, the jurors sworn in it are called and sev-

erally answer to their names, except the said juror Nathan L. Ely, excused as aforesaid on Jan. 20, 1880, by consent of parties. Charge by the court to the jury having been reserved until this day, charge is given by the court to the jury, who retire in charge of an officer duly qualified to attend them, and on their return say that they find a verdict for the defendant, and so they say all.

On action of Mr. Hartley, ordered that plaintiff have thirty days'
16 stay of proceedings within which to prepare and serve a bill of exceptions herein.

17 *Judgment.*

United States circuit court, southern district of New York.

HENRY NEWMAN
vs.
CHESTER A. ARTHUR. } 187 .

The issues in this action having been brought on for trial, before Mr. Judge Shipman and a jury, at a circuit court of the October term, 1879, and the issues having been tried, and a verdict for the defendant having been duly rendered on the twenty-first day of January, 1880, and his costs having been adjusted at $68.41:

Now, on motion of Stewart L. Woodford, United States attorney for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $68.41, his taxed costs, and have execution therefor.

Judgment signed this 14th day of September, 1880.

J. M. DEUEL, *Dep. Clerk.*

18 (Indorsed:) United States circuit court. Henry Newman vs. C. A. Arthur. Judgment roll. Stewart L. Woodford, United States attorney for defendant. Filed , 187 . Costs $68.41. U. S. circuit court, Sept. 14, 1880. John I. Davenport, clerk.

19 *Engrossed bill of exceptions.*

U. S. circuit court.

HENRY NEWMAN
vs.
CHESTER A. ARTHUR. }

This cause came on for hearing on the 18th day of January, 1880, before the Hon. Nathaniel Shipman and a jury, and the plaintiff, to sustain the issues on his part, proved that between August 3rd and December 6, 1875, he made eleven importations of merchandise from Liverpool, upon which the collector assessed a duty of five and a half cents a square yard and twenty cents ad valorem. The plaintiff at the time of the liquidation claimed that the goods were liable to a duty of only thirty-five per cent. ad valorem as manufactures of cotton not otherwise provided for, and duly protested against the exaction of the difference between that rate

and the rate exacted, and duly appealed to the Secretary of the
20 Treasury, and brought suit within the time required by law to enable him to recover back the said difference, if illegally exacted. It was proven that goods like those in question were first manufactured in Manchester, England, in 1868 or 1869, they being then a new article of manufacture, and were first introduced into this country in 1869 or 1870. Goods like the importations in question have been known since their first introduction into this country in trade and commerce by the name of cotton Italians, and used exclusively for coat linings. The importations in question were wholly of cotton and dyed black in the piece, after being woven, and were made in imitation of a well-known article called Italian cloth, made of wool, and used for lining woolen coats. The surface of the cotton Italians was by some process of weaving and calendering made smooth and glossy like that of the real Italians. Plain woolen goods are those in which the warp and woof threads cross
21 each other at right angles.

Cotton Italians are not plain woven, but are twilled goods, and had upon them figures of different designs made in weaving. The cotton Italians in question had more than one hundred threads and less than two hundred threads to the square inch, counting the warp and filling, and were less in weight than five ounces to the square yard, and did not exceed in value 25 cents to a square yard. Plaintiff's counsel gave evidence tending to show that the number of threads to the square inch in plaintiff's importations could not be counted without unravelling the goods.

The plaintiff's counsel asked the plaintiff, who was duly sworn as a witness in the cause, the following question: "Are the goods bought and sold by the count of the number of threads?"

The defendant's counsel objected to the question as immaterial. The court sustained the objection, and plaintiff's counsel duly ex-
22 cepted.

The plaintiff's counsel then offered to prove by the witness that goods like those in question were never known in trade and commerce in this country as countable goods, or so bought and sold.

The defendant's counsel objected to the evidence as immaterial. The court sustained the objection, and plaintiff's counsel duly excepted. Plaintiff's counsel then offered to show that prior to 1861, and ever since, there have been in trade and commerce in this country a great variety of cotton cloths known as countable goods, and which were bought and sold by the number of threads in the warp and filling, which number of threads were ascertainable by a glass and without taking the fabric to pieces.

The defendant's counsel objected to the question as immaterial. The court sustained the objection, and plaintiff's counsel duly excepted. The plaintiff's counsel then asked the witness the following question:
23 "Was the value of cotton Italians partially or wholly determined between the manufacturer and the purchaser according to the number of threads to the square inch?"

(To this question defendant's counsel objected, as immaterial. The court sustained the objection, and plaintiff's counsel duly excepted.)

It was further proven that in 1832 there were, and ever since that time there have been, imported into this country from abroad well-known cotton piece goods, some of which had in trade and commerce been known *been*

known as bleached goods, others as unbleached goods, others as stained goods, others as painted goods, others as colored goods, others as printed goods, and others as dyed goods. It was conceded that goods like plaintiff's goods were not either bleached, unbleached, stained, painted, or printed goods. They had passed beyond the stage of unbleached or bleached goods, and were not stained, painted, or printed goods.
24 These terms refer to the process by which color is applied to one side only of the goods. The plaintiff offered evidence to prove that during the times aforesaid there were imported a well-known class of cotton piece goods woven from colored yarns, which yarns were dyed before weaving, and that such piece goods were known in the trade as colored goods. That at the same times there were also imported a well-known class of cotton piece goods which had been dyed after being woven, and that, such goods were known in the trade as dyed goods. That at the times aforesaid, in trade and commerce, neither black nor white were colors, nor were plaintiff's goods known as colored goods.

It was conceded for the purposes of this case that plaintiff's goods were neither cotton jeans, denims, drillings, bed-tickings, ginghams, plaids, cottonades, nor pantaloon stuffs, nor goods of like description to
25 them or either of them, nor for similar use.

Plaintiffs having rested, defendant then introduced testimony tending to show that the term "colored" goods as applied to cotton goods have always meant *and* in trade and commerce goods which have advanced beyond the bleached and unbleached state, and have received another than the natural color by the application of dyes; that they have always been known as colored goods, both when the color is applied to the cotton while in the yarn and when it is applied by dying the woven fabric in the piece; that colored goods and dyed goods are synonymous terms, and have always meant in trade and commerce goods dyed in the yarn or in the piece, whereby another than the natural color was the result; that "colored" has always meant in trade and commerce a change from the natural color by the application of dyes, whether to the yarn before the fabric
26 is woven or to the fabric after it is woven; that black has always been generally regarded in trade and commerce as a color, and has always been and is now so included in the word "colored"; that the number of threads to the square inch in the goods in question can be counted, and that they had been counted, and were between 100 and 200 to the square inch.

Both parties having rested, the court charged the jury as follows:

GENTLEMEN OF THE JURY: The plaintiffs imported into the port of New York in the year 1875 sundry invoices of cotton fabrics, used for the linings of men's coats, called cotton Italians, upon which the collector of the port exacted a duty of 5½ cents per square yard, and in addition thereto 20 per cent. ad valorem. The plaintiff protested that these goods were dutiable at 35 per cent. ad valorem, under the last clause of Sched-
27 ule A, section 2504 of the Revised Statutes, assessing that rate of duty upon all other manufactures of cotton not otherwise provided for, and paid the exacted amount under protest, in order to obtain possession of the goods. Appeals were duly made to the Secretary of the Treasury, and in proper time this action was brought to recover the alleged excess of duty which had been paid. It is not denied that the plaintiff's goods are

woven fabrics, containing between 100 and 200 threads to the square inch, counting the warp and filling.

Schedule A includes all cotton goods which are classified in the schedule under various subdivisions, the main division being that of woven goods. No cotton articles are assessable under the final clause "on all manufactures of cotton not otherwise provided for" if they have been provided for or have been named under any of the preceding clauses of the schedule.

28 The presumption of law is in favor of the validity of the assessment of the collector, and it is incumbent upon the plaintiff to overcome that presumption by a fair preponderance of proof.

They have therefore undertaken to satisfy you that cotton Italians are not provided for in any clause of the statute, except the final one, which I have quoted. The plaintiff, taking up the more specific clause of the schedule, which relates to woven goods, offered evidence in the first place to show that cotton Italians were not goods of like description to cotton jeans, denims, etc., which are dutiable at a higher rate than that which was imposed by the collector upon Italians at the time of the importation in question, but investigation of that question of fact has become useless, as the district attorney for the purpose of this case disclaims that these goods are dutiable under the clause to which I have referred. The plaintiffs next

29 assert that their goods were not dutiable under the only remaining clause which the Government claims is applicable, and under which they were assessed, and which is in substance as follows: "On all manufactures of cotton, except jeans, denims, drillings, bed-ticking, ginghams, plaids, cottonades, pantaloon stuff, and goods of like description (and it is conceded that these goods do not come within the exception) not exceeding 200 threads to the square inch, counting the warp and filling, unbleached, 5 cents per square yard; if bleached, 5½ cents per square yard, and if colored, stained, painted, or printed, 5½ cents per square yard, and in addition thereto 20 per cent. ad valorem. The cotton Italians in controversy were black in color, and like all Italians were dyed in the piece. Cotton Italians may be of different colors, but are never dyed in the yarn. These goods had passed beyond unbleached as bleached goods.

30 They were neither stained, painted, or printed, which terms refer to the process or manufacture by which color is applied to one side only of the goods.

The plaintiffs claim that they are not colored, because they claim that the term colored was at the date of the passage of the act in December, 1863, a commercial one, and indicated, first, goods which were woven in colored yarns, or in other words, jeans, &c., which were dyed before being woven, and did not mean which were dyed in the piece; second, meant goods which were woven in colors, other than black, which in strictness is not a color.

The defendant says, on the other hand, that colored cotton goods meant goods which had advanced beyond the unbleached or bleached state, and had received another than the natural color, by the application of dyes, and that it is immaterial whether the color was applied when the cotton

31 was in the yarn, or when the woven fabric was in the piece; in other words, that colored goods and dyed goods are synonymous terms, and meant goods dyed at any time, whereby another than the natural color was the result.

The plaintiffs take the burden of proof and have introduced a number of merchants who say that in trade and commerce, colored, as used by importers and wholesale dealers in this country, meant, at and prior to the passage of the revised statutes, goods woven in colored yarns.

The defendant meets this testimony by merchants who say that the plaintiffs' distinction never existed and that colors always meant a change from the natural color by the application of dyes. The question of fact has become so simple and so easily understood that I do not think I am called upon to enlarge upon the evidence, indeed it would be difficult to do so, without communicating my opinion. The plaintiff has com-

32 mented to you upon the previous statutes, claiming that they offered evidence that dyed and colored are different terms; one of them, which will serve as a sample for all, is as follows:

"On all goods embraced in the foregoing schedules that are not painted, colored, or stained, there shall be levied, paid, and collected," etc. * * * "On all manufactures composed wholly of cotton, bleached, unbleached, printed, painted, or dyed, not otherwise provided for, 30 per cent. ad valorem." You will see in the first clause which I read, "colored" is used, and in the last clause "colored" is not used, but the term "dyed" is interposed.

The plaintiffs claim that these statutes 1861 and 1862, affords evidence that dyed or colored were different terms. The defendant has not answered that suggestion, but probably will claim that if these statutes are useful at all to the jury, they are useful to show that dyed and colored

33 were used as synonymous terms, and not as of different import. Upon the second branch of the plaintiffs' proposition that black was not included in the term "colored," because black is not a color, the defendant replies by his witnesses, who say that while black is technically not a color, yet commercially it always has been a color, and that "colored" means, as I have said before, any change from the natural color by the use of dyes.

If, then, the plaintiff has satisfied you that cotton Italians were not within the commercial meaning of the term "colored," as that term was used in trade and commerce among importers and wholesale dealers generally in this country at and prior to December, 1873, then they are entitled to a verdict for $3,083.81. If the plaintiffs have failed thus to satisfy you, the defendant is entitled to a verdict.

The plaintiffs' counsel then requested the court to charge the jury—

34 1st. That paragraphs 921, 922, and 923 of Heyle's Digest, which are the provisions of law under which the importations in question were assessed for, apply only to plain woven goods.

The court refused so to charge, and plaintiffs' counsel duly excepted.

2nd. That if goods like those imported by plaintiff were not known in trade and commerce of this country as colored goods when the act of June 30, 1864, was passed, then plaintiff is entitled to recover.

The court refused so to charge, and plaintiffs' counsel duly excepted.

3rd. That if the number of threads to the square inch in plaintiffs' goods, counting the warp and filling, cannot be counted without taking the goods to pieces, then the plaintiff is entitled to recover.

The court refused so to charge, and plaintiff's counsel duly excepted.

35 4th. That the evidence showed that goods in the piece, woven from different colored dyed yarns, but not from black or white yarns, were known in the trade in this country, at the date of the tariffs of 1832, 1833, 1846, 1857, 1861, 1862, and 1864, and at the time of the importation of the goods in question, as colored goods. The court refused to charge otherwise than it had charged, and plaintiff's counsel duly excepted.

5th. That cotton Italians, being a new manufacture and unknown here and abroad when the act of 1864 was passed, they were not specifically enumerated, and the presumption until rebutted is that they come under the general provision of manufactures not otherwise provided for.

The court refused so to charge, and plaintiff's counsel duly excepted.

6th. That the undisputed evidence showed that piece goods
36 woven in the grey and dyed after being woven were known at the dates of the several tariffs above referred to as dyed goods.

The court refused so to charge, and plaintiff's counsel duly excepted.

7th. That the duty on manufactures of cotton, colored, cannot be imposed on cotton Italians, because no such goods was known in trade and commerce when the act of 1874, imposing the duty, was passed.

The court refused so to charge, and plaintiff's counsel duly excepted.

8th. That if the jury find that plaintiff's goods are known in
37 trade and commerce as dyed goods plaintiff is entitled to recover.

The court refused so to charge, and plaintiff's counsel duly excepted.

And inasmuch as the matters aforesaid do not appear by the record, the plaintiff's counsel has caused this bill of exceptions to be made, which was duly signed and settled on the 8th day of May, 1880.

N. SHIPMAN, *Judge*. [SEAL.]

Correct.

S. L. WOODFORD,
U. S. Att'y, for Def't.

(Endorsed:) U. S. circuit court. Henry Newman vs. Chester A. Arthur. Engrossed bill of exceptions. Stanley, Brown & Clarke, att'ys for pl'ff, 195 Broadway, N. Y. U. S. circuit court. Filed Jan. 22, 1880. John I. Davenport, clerk.

38 Supreme Court of the United States.

HENRY NEWMAN *ag'st* CHESTER A. ARTHUR. } No. 4671.

Of October term, in the year of our Lord one thousand eight hundred and eighty.

Afterwards, to wit, on the third Monday of the said October term, before the justices of the Supreme Court of the United States, at the capitol in the city of Washington, comes the said Henry Newman, by Stanley, Brown & Clarke, his attorneys, and says that in the record and proceedings aforesaid, there is manifest error in this, to wit, in the several rulings of the

court upon the rejection or admission of testimony to which exception has been taken.

That there was error in the several instructions of the court to the jury, to which exception has been taken, and the refusal of the court to instruct the jury as therein prayed for.

Also, in that judgment was given for the defendant in error against the plaintiff in error, whereas by the law of the land, judgment ought to have been given for the said plaintiff in error, against said
39 defendant in error.

And the said Henry Newman prays that the judgment aforesaid may be erversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment.

STANLEY, BROWN AND CLARKE,
Attorneys for Plaintiff in Error.

(On margin:) E. C. M.

(Indorsed:) Supreme Court of the United States. Henry New-
40 man ag'st Chester A. Arthur. Assignment of error. Stanley, Brown and Clarke, att'ys for pl'ff in error, 195 B'way.

Due service of a copy of the within is hereby admitted. N. Y., Sept. 27, 1880.

STEWART L. WOODFORD,
U. S. Attorney, Att'y for Def't.

U. S. circuit court. Filed Sep. 28, 1880. John I. Davenport, clerk.

41 *Joinder in error.*

Supreme Court of the United States.

HENRY NEWMAN, PLAINTIFF IN ERROR,
vs.
CHESTER A. ARTHUR, DEFENDANT IN ERROR.

And afterwards, to wit, on the third Monday of October, 1880, the said Chester A. Arthur, defendant in error, by Stewart L. Woodford, his attorney, comes here into court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the records and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

STEWART L. WOODFORD,
Attorney for Defendant in Error.

(On margin:) E. F. M.

42 (Indorsed:) U. S. Supreme Court. Henry Newman, plaintiff in error, versus C. A. Arthur, defendant in error. Joinder in error.

Stewart L. Woodford, United States attorney, att'y for def't in error. To Messrs. Stanley, Brown & Clarke, att'ys for pl'ff in error.

Due service of a copy of the within is hereby admitted, Sept. 29, 1880.
STANLEY, BROWN & CLARKE,
Pl'ff's Attorneys.

U. S. circuit court. Filed Sep. 29, 1880. John I. Davenport, clerk.

43 *Bond for damages and costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

HENRY NEWMAN
vs.
CHESTER A. ARTHUR.

Know all men by these presents that we, Julius Birge, of No. 110 East 61 street, New York City, and James T. Drummond, of 44 Exchange Place, in said city, are held and firmly bound unto the above-named Chester A. Arthur in the sum of two hundred & fifty dollars, to be paid to the said Chester A. Arthur, for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 18th day of September, in the year of our Lord one thousand eight hundred and eighty.

Whereas the above-named Henry Newman hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Henry Newman shall prosecute said writ of error to effect and answer all damages and costs if he shall fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JULIUS BIRGE. [L. S.]
JAMES T. DRUMMOND. [L. S.]

Sealed and delivered, and taken and acknowledged, this 18th day of September, 1880, before me.

MELVIN BROWN,
Notary Public, Kings Co.
(*Certificate filed in N. Y. Co.*)

44 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Julius Birge & James T. Drummond, severally being duly sworn, each depose and say that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JULIUS BIRGE.
JAMES T. DRUMMOND.

Sworn to this 18th day of Sept., A. D. 18 , before me.
[L. S.] MELVIN BROWN,
Notary Public, Kings County.
(Certificate filed in N. Y. Co.)

(Indorsed:) U. S. circuit court. Henry Newman vs. Chester A. Arthur. Bond for damages and cost on writ of error. Stanley, Brown & Clarke, pl'ff's att'ys, 195 B'way.

Approved.
N. Y., Sept. 18, 1880.
SAM'L BLATCHFORD.

U. S. circuit court. Filed Sept. 24, 1880. John I. Davenport, clerk.

45 UNITED STATES OF AMERICA, *ss:*

To Chester A. Arthur, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the fourth Monday of October, eighteen hundred and eighty, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Henry Newman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated New York, September 18, 1880.
SAM'L BLATCHFORD.

46 (Indorsed:) 4671. E. & A. A. 303. U. S. Supreme Court. Henry Newman, plaintiff in error, against Chester A. Arthur, defendant in error. Original citation. Stanley, Brown & Clarke, pl'ff's att'ys, 195 B'way.

(Stamp:) U. S. circuit court. Filed Sep. 24, 1880. John I. Davenport, clerk.

Due service of a copy of the within is hereby admitted.
N. Y., Sept. 24, 1880.
STEWART L. WOODFORD,
U. S. Attorney, Att'y for Def't.

(Indorsment on cover:) No. 76. Henry Newman, plaintiff in error, vs. Chester A. Arthur, collector of the port of New York. S. New York C. C. U. S. Filed 8th October, 1880.

OFFICE SUPREME COURT U.S.
FILED
OCT 20 1883
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

NEWMAN
v.
ARTHUR.
No. 76.

PLAINTIFF'S BRIEF.

Sworn to this 18th day of Sept., A. D. 18 , before me.
[L. S.]

MELVIN BROWN,
Notary Public, Kings County.
(Certificate filed in N. Y. Co.)

(Indorsed:) U. S. circuit court. Henry Newman vs. Chester A. Arthur. Bond for damages and cost on writ of error. Stanley, Brown & Clarke, pl'ff's att'ys, 195 B'way.

Approved.
N. Y., Sept. 18, 1880.

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U. S. circuit court. Filed Sept. 24, 1880. John L. Davenport, clerk.

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Dated New York, September 18, 1880.

SAM'L BLATCHFORD,

46 (Indorsed:) 4671. E. & A. A. 503. U. S. Supreme Court. Henry Newman, plaintiff in error, against Chester A. Arthur, defendant in error. Original citation. Stanley, Brown & Clarke, pl'ff's att'ys, 195 B'way.

(Stamp:) U. S. circuit court. Filed Sep. 24, 1880. John L. Davenport, clerk.

Due service of a copy of the within is hereby admitted.
N. Y., Sept. 24, 1880.

STEWART L. WOODFORD,
U. S. Attorney, Att'y for Deft.

(Indorsment on cover:) No. 76. Henry Newman, plaintiff in error, vs. Chester A. Arthur, collector of the port of New York. S. New York C. C. U. S. Filed 8th October, 1880.

109-132

OFFICE SUPREME COURT U.S.
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SUPREME COURT OF THE UNITED STATES.

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NEWMAN
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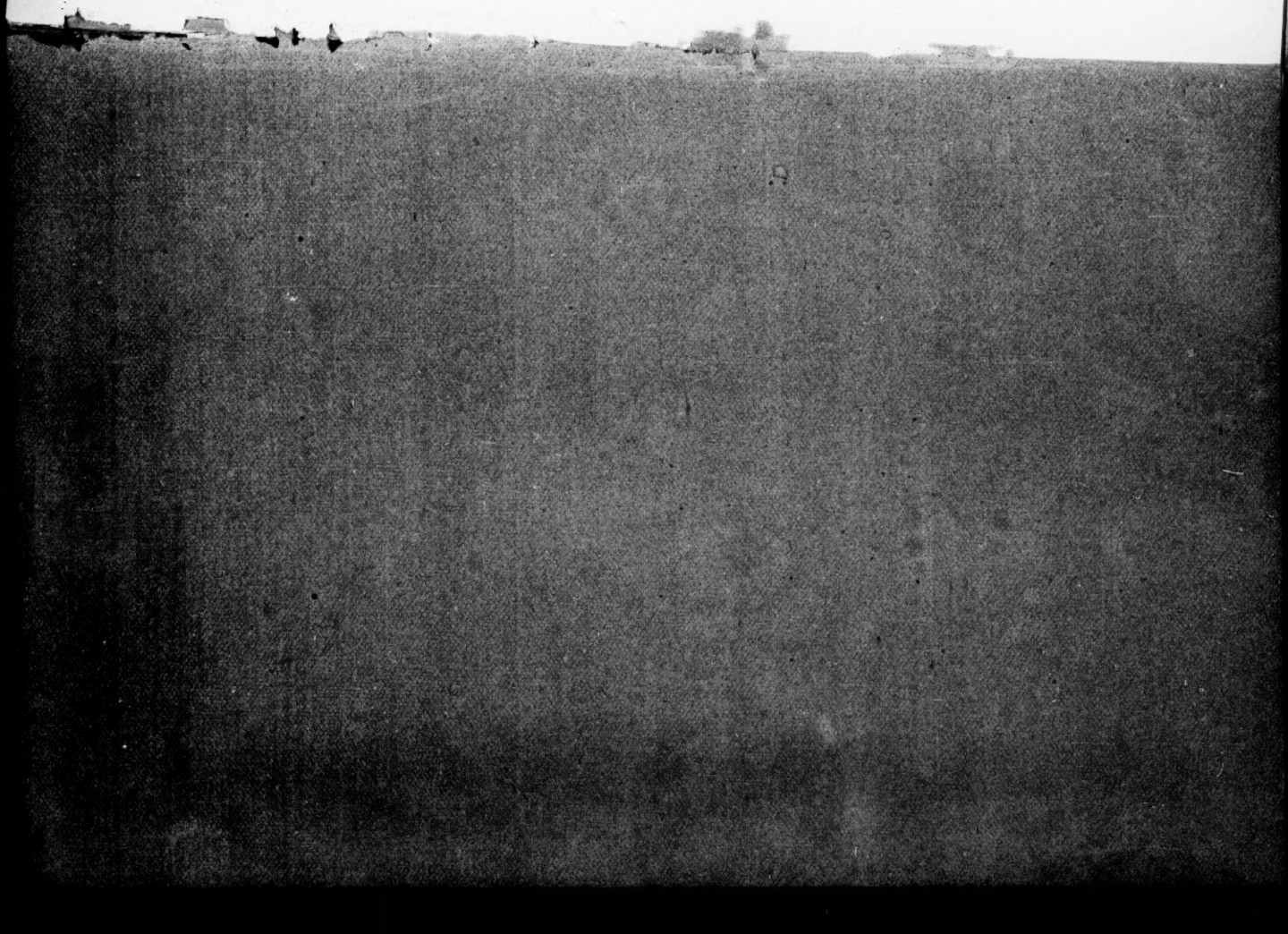
PLAINTIFF'S BRIEF.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

HENRY NEWMAN
AGAINST
CHESTER A. ARTHUR.
No. 76.

PLAINTIFF'S BRIEF.

Statement.

In the fall of 1875 the plaintiff imported into New York goods, used exclusively for coat linings and commercially known, ever since their first introduction into this country, in 1869 or 1870, by the name of "Cotton Italians." They were first manufactured in 1868 or 1869 at Manchester, England. They were made wholly of cotton and dyed black in the piece after being woven; and were imitations of a well known article, made of wool, known as "Italian Cloth," used for lining woolen coats. By some process of weaving and calendering, the surface of these cotton Italians was made smooth and glossy like that of the real Italians.

Cotton Italians are not plain woven, but are twilled goods, and had upon them figures of different designs made in weaving. Those here in question had more than one hundred threads and less than two hundred threads to the square inch, counting the warp and filling, and were less in weight than five ounces to the square yard, and did not exceed in value twenty-five cents to a square yard. The plaintiff's uncontradicted evidence tended to show that the number of threads to the square inch could not be counted without unravelling the goods.

The plaintiff then offered to prove that these goods were not bought and sold by the count of the threads; that they were never known in trade and commerce as countable goods, or so bought and sold; and that, prior to 1861 and ever since, there have been in the trade and commerce of this country a great variety of cotton cloths known as "countable goods," and which were bought and sold by the number of threads in the warp and filling; which number of threads were ascertainable by a glass, and without taking the fabric to pieces; that the value of these cotton Italians was not, either partially or wholly, determined between the manufacturer and purchaser by the number of threads to the square inch.

The Court excluded all the testimony offered by the plaintiff to prove these facts, and all questions put for the purpose of eliciting such testimony and facts, and the plaintiff excepted. (Record, 9.)

The defendant, then collector of the port of New York, collected duties upon these goods under the middle paragraph of that portion of R. S., Sec. 2405, Schedule A, relating to countable cotton goods; which is designated as paragraph 922 in Heyl's Digest of the Tariff Laws, as follows:

"921. On all manufactures of cotton * * * not bleached, colored, stained, painted, or printed, and not exceeding one hundred threads to the square inch, counting the warp and filling, and exceeding in weight five ounces per square yard, five cents per square yard; if bleached, five cents and a half per square yard; if colored, stained, painted or printed, five cents and a half per square yard and, in addition thereto, ten per centum ad valorem.

922. On finer and lighter goods of like description, not exceeding two hundred threads to the square inch, counting the warp and filling, unbleached, five cents per square yard; if bleached, five and a half cents per square yard; if colored, stained, painted or printed, five and a half cents, and in addition thereto twenty per centum ad valorem."

Against this action, plaintiff protested and took all necessary steps to have it judicially reviewed.

He contended that his importations were dutiable under the concluding clause of R. S., Sec. 2504, dutying "all other manufactures of cotton, not otherwise provided for, thirty-five per centum ad valorem."

The plaintiff's counsel asked the Court to give these instructions, and excepted separately to the refusal to give each severally, viz.:

1st. "That paragraphs 921, 922 and 923 of Heyl's Digest, which are the provisions of law under which the importations in question were assessed, apply only to plain woven goods.

2d. That if goods like those imported by plaintiff were not known in trade and commerce of this country as colored goods when the act of June 30, 1864, was passed, then plaintiff is entitled to recover.

3d. That if the number of threads to the square inch in plaintiff's goods, counting the warp and filling, cannot be counted without taking the goods to pieces, then the plaintiff is entitled to recover.

4th. That cotton Italians, being a new manufacture, and unknown here and abroad when the act of 1864 was passed, they were not specifically enumerated, and that the presumption until rebutted is that they come under the general provision of manufactures not otherwise provided for." (Record, pp. 12, 13.)

Assignment of Errors.

The plaintiff assigns for error the rulings of the presiding judge at the trial, excluding the evidence offered by plaintiff, as above indicated; also the refusal to give the several instructions, or any of them, as about set forth.

BRIEF.

I.

By the evidence offered and rejected, it was proposed to show that, before and under the act of June 30, 1864, Ch. 171, Sec. 6—of which the clauses of R. S., Sec. 2504, schedule A, applicable to these goods, are a literal reproduction—there had been and, up to the first making of these goods in 1868 or 1869 and their importation hither the next year and thereafterwards hitherto, continued to be certain goods of a particular manufacture, *possessing a certain distinctive trait of countability*, (to coin a word), known to the trade and commerce of this country as "countable goods;" that these goods were traded in, bought and sold, by the number of threads in the warp and filling, as ascertained by a glass. and without tearing the fabric to pieces. (Record, 9; fols. 21 and 22.) Thus, in these "countable goods," existing prior to 1868, the number of threads per square inch was *the* determining element of value. Yet the Court below refused to allow the plaintiff to show that, as to Cotton Italians, the number of threads was never ascertained, as between buyer and seller, to determine value. (*Id.*, fol. 23.) Certainly, a law addressed to merchants, assuming to impose an ad valorem duty, *ought* to regard that value.—and *that method of ascertaining value*,—current among the merchants.

It is not proposed to call the attention of the Court, for the thousandth time, to its decisions—scattered all through the reports from the "Two Hundred Chests of Tea" (9 Wheat., 430) down to those in 96 U. S. (pp. 108, 112, and 135)—establishing the elementary proposition that "The object of the duty laws is to raise revenue and, for this purpose, to *class* substances *according to the general usage* and known denominations of trade." Story, J., in 9 Wheaton, 438.

We do wish to observe that the learned and experienced judge below—while he would, doubtless, apply this principle to articles dutiable under specific names, such as "bohea," etc., etc. —seems to us to disregard the spirit of this rule when he confines it to the mere appellations of commerce, and ignores its classifications and "general usage."

In enacting or construing customs legislation, there is no reason for regarding the mere nomenclature of trade, except as the name indicates the thing dealt in by merchants and, more especially, *their course of dealing in the article thus designated;* and *this* controlling reason applies equally to articles comprehended within the terms of a descriptive clause as to those pointed out by a name.

It is not the name, but what is in the name, that is to be considered.

To apply these observations—there was, when this act of June 30, 1864, § 6, and its predecessors were passed, a line of goods classed as "countable goods," and dealt in "according to the general usage," by the number of threads which the glass disclosed within a square inch of the fabric.

Legislating with reference to this existing state of facts and course of trade, Congress adopted *the same method of levying duty* upon them *that the merchants had first adopted for ascertaining and determining their value.*

Cotton Italians were not within the contemplation of these acts, because they had not yet been conceived in the imagination of the artificer.

If, when they were produced, they had naturally fallen, by the course and usage of trade, into that class of goods dealt in by the count of threads, and their value thus ascertained, it would of course have been proper to ascertain the duty in the same way.

They not only did *not* fall into this class, as articles of commerce, but *they were not of a character to which the ordinary test*, theretofore in use, *could be applied.*

The threads could be counted, indeed, (as all things, almost, are possible, one way or another) but *not by the glass*, as they could in goods theretofore treated as "countable." The fabric must be torn to pieces; a method of treatment not before applied to articles coming under this clause; and *not applied to Cotton Italians for any purpose of trade,* but only in the levying of duty.

Not only in the modes of ascertaining their value, and of buying and selling them, did these Cotton Italians differ from

"countable goods," but as widely also in *the use to which they were exclusively put.*

They were "used exclusively for coat linings," like the "well-known article called Italian cloth, made of wool, and used for lining woolen coats," of which they were an imitation. (Record, 9, fol. 20).

The plaintiff's goods, then, were not assimilated, either in commercial nomenclature and usage nor in actual use, to the articles dutiable under the countable clauses of tariff legislation in force when the looms of Manchester first wrought out this idea of the artisan in 1868–9.

If there ever was a case in which the *principle* of the doctrine of *ejusdem generis* ought to apply, this is one—*i. e.*, to consider what *sort of thing* the legislators had in mind in legislating, and then so to construe their legislation as to make it applicable to things of like nature, and to them only.

A distinguished Associate of this Court, who has retired from its onerous and honorable duties to enjoy *otium cum dignitate* in New-York, was accustomed to recur to and express in his opinions upon questions of statutory construction this fundamental proposition that

"The intention of the law-maker is the law. A thing within the *intention* of the makers of the statute is as much within the statute as if it were within the letter."

Using this language in the very first opinion promulgated through him in 1861 (1 Black, 61) he not only acted upon that idea but reiterated its ennunciation in certainly more than twenty cases before he voluntarily terminated his high judicial career.

At the Oct. Term, 1879, ending as he had begun, he observed:

"This we think is too narrow a construction of the law. A thing may be within a statute but not within its letter, or within the letter and yet not within the statute. The intent of the law-maker is the law." 101 U. S., 626, middle, citing 15 Johns., 380–1.

In 10 Wallace, 406, he applied this maxim to the internal excise laws, of which he said:

"They are remedial in their character, and to be construed liberally, to carry out the purposes of their enactment;" repeated,

substantially, in 23 Wall., 380, and 19 Wall., 427, bottom. He used to cite the Ohio cases, which use this strong language:

"It frequently becomes the duty of courts, in order to give effect to the manifest intention of a statute, to restrain, or qualify, or enlarge the ordinary meaning of the words that are used. It is said that the power of construing a statute, is in the judges, who have authority over all laws, and more especially over statutes, to mould them, according to reason and conscience, to the best and truest use.

The intention of the law-makers may be collected from the cause or necessity of the act; and statutes are sometimes construed contrary to the literal meaning of the words. It has been decided that a thing within the letter was not within the statute, unless within its intention. The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter." (4 Bac. Title Statute, I S. 38, 45, 50.) Again, he says, on page 222: "Every statute should be construed with a reference to its *object*, and the will of the law-makers is best promoted by such a construction as secures *that object*, and excludes every other." Slater v. Cave, 3 Ohio St., 85, quoting 1 Ohio, 479–480.

This familiar principle, as the same judge observes, (19 Wall., 40, bottom) has constantly to be applied not only to statutes but to wills, deeds and contracts because "Human affairs are largely conducted upon the principle of implication."

As he notices in another case, the only difficulty lies in the application of the principle: and herein it is that we think the judge below erred in the present case.

Congress *could not* have intended at the date of the enactment, to impose the duty exacted from the plaintiff upon this article *specifically*, because it then had no existence; it could not have been intended to embrace it within the *general terms*, because it had not the distinctive trait by which the goods covered by the act at its date are known, distinguished, bought, sold and valued.

Pressed by these considerations, the practical business man who was called to be the head of the Treasury Department soon after this act of June 30, 1864, § 6, went into operation, gave to it the precise construction for which we contend, as applying it to certain cotton goods the threads of which are susceptible of being counted, but not without destroying some portion of the fabric. Had Cotton Italians then been in existence and a subject of importation, they manifestly would have come within the

rule laid down in the following letter, the directions of which are still obeyed as to the particular articles with relation to which it was written.

The Secretary adopted "the classification *derived from the actual business* of human life." Elliott v. Swartwout, 10 Peters, 151.

TREASURY DEPARTMENT,
WASHINGTON, D. C., January 3, 1866.

SIR—Your letter of the 23d inst. is received in answer to Department's letter of the 16th inst. touching the classification of "Manfs. of Cotton" particularly as to which description should be considered liable at 35% ad val. duty and which to the duty imposed according to the number of threads to the square inch.

It is quite evident that *the statute is not as clear as it should be in this connection* and consequently it is somewhat difficult to prescribe a very definite regulation for your government in classifying such goods.

The terms of the law imposing duty according to the count of threads should be in my opinion, held to apply in all cases *where such count can be ascertained by means of the "glass" commonly used* for such purposes and in all cases *where the value of the goods is partially or wholly determined between the manufacturer and the purchaser according to the number of threads* to the square inch, etc.

Should any difficulty occur in the practical observance of this rule you will please report it at once making such suggestions as may occur to you as in your judgment would remedy the objections.

I am very Respy
H. MCCULLOGH,
Secy of the Treasy.

To B. L. LUDDINGTON,
U. S. Appraiser,
N. Y.

Cotton bed-quilts, towels, tidies and various other articles of that class have since been held dutiable at 35% as "manufactures of cotton," etc.

Cotton velvets are susceptible of having the threads contained in a square inch counted by unravelling, but not by the glass. Had Cotton Italians been then extant they would, doubtless, have been *specified* in the same clause; being a subsequent creation, they should come within its general terms.

Although this section and schedule commences "on *all* man-

ufactures of cotton," etc., etc., yet it *cannot* literally intend every fabric of which cotton is the raw material, since that construction would make the subsequent clauses,—as to cotton shirts, drawers, hosiery, velvet, and "all other manufactures of cotton, not otherwise provided for"—utterly useless and leave them, especially the last clause, absolutely nothing to which they could apply. 95 U. S., 763, bottom.

Congress did not mean to subject to this "countable" clause every article of cotton manufacture of which, by cutting out a square inch, the number of threads constituting the warp and woof of that area could be counted; but only those articles in which the threads *were* counted in ordinary merchantile transactions therein, and which could be counted by methods practiced by the trade.

Thus in Barlow v. U. S., 7 Peters, 409, a restricted meaning was given to the designation "refined sugars;" and so in multitudinous cases not necessary to be individually specified.

II.

The requested instruction "that Cotton Italians, being a new manufacture unknown here and abroad when the act of 1864 was passed, they were not specifically enumerated and the presumption, until rebutted, is that they come under the general provision of manufactures not otherwise provided for" (Record, 13) should have been given.

Curtis v. Martin, 3 Howard, 106, and kindred decisions.

The facts proved, and which we offer to prove, bring Cotton Italians within the spirit of the rule laid down it these cases.

III.

The Court will notice that other exceptions were taken, based (apparently) upon the evidence adduced to show a merchantile distinction between goods made from colored yarns and those dyed in the piece.

Those who dealt in colored and dyed cottons recognized this distinction; but the government overbore the plaintiff by the testimony of dealers in white cottons, to whom this distinction was unknown, and so the jury found that fact against us. I do not deem it advisable, therefore, to discuss legal propositions based upon the assumed existence of a fact thus negatived.

Though I have but recently taken up this record,—in the constrained absence of Mr. Stanley whose health still keeps him away, and from whom I have been unable to obtain any suggestion in regard to it—the real truth is apparent to me, as I think it must be to every judge or lawyer accustomed to *nisi prius* practice, that this case was originally instituted upon the theory that it could be abundantly proved that Cotton Italians were not, in the technique of merchants, and in their dealings therein "countable goods;" and when the Court unexpectedly (and wrongly, as we thoroughly believe) excluded this evidence, Mr. Stanley—instead of standing by his position, and testing the correctness of that ruling—endeavored to fall back upon another issue of fact for the jury, for the trial of which he was not so well prepared as he would have been had he not relied with such implicit confidence upon the first proposition.

Our confidence in its correctness is still unabated.

EDWIN B. SMITH,
Of Counsel.

STANLEY, CLARKE & SMITH,
160 Broadway, New York,
Attorneys for plaintiff.

10 f. 132

OFFICE SUPREME COURT U. S.
FILED
OCT 23 1883
JAMES H. McKENNEY, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

NEWMAN
v.
ARTHUR, COLLECTOR. } No. 76.

BRIEF FOR THE COLLECTOR.

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EDWIN B. SMITH,
Of Counsel.

STANLEY, CLARKE & SMITH,
160 Broadway, New York,
Attorneys for plaintiff.

10 f 122

OFFICE SUPREME COURT U. S.
FILED
OCT 29 1883
JAMES H. MCKENNEY, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

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In the Supreme Court of the United States.

OCTOBER TERM, 1883.

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ARTHUR, COLLECTOR. } No. 76.

BRIEF FOR THE COLLECTOR.

The question involved is the proper rate of duty upon a cotton cloth known as "cotton Italians," the collector having levied the duty upon "colored" *countable cottons*, as they are called, specified in the second paragraph of Schedule A (Rev. Stat., p. 460, see appendix), *i. e.*, $5\frac{1}{2}$ *cents per square yard, and in addition* 20 *per cent. ad valorem*, while the importer contends that the goods are provided for in the last paragraph of the same schedule, *i. e.*, "*all other manufactures of cotton not otherwise provided for,* 35 *per cent. ad valorem.*"

A question underlying the above is whether the expression in Schedule A, which is used to designate one or other of the various *countable cottons* therein mentioned,

is a *commercial* expression, and therefore to be explained by commercial usage, or is used according to its *popular import*. That expression is "*all manufactures of cotton not exceeding two hundred* [or other number of] *threads to the square inch.*"

Understanding it to be a *commercial* term, the importer offered evidence of its meaning. This evidence was objected to, and thereupon was excluded.

The importer also filed eight exceptions to the charge of the court. Of these he now assigns error upon the first, second, third, and fifth.

1. The expression, "all manufactures of cotton not exceeding two hundred threads to the square inch" is not of a commercial nature.

It may be that the legislature intended thereby to recognize the fact that finer goods employ finer and more complicated processes of manufacture, and therefore higher prices; but this is a very different conclusion from that now suggested by the importer, viz, that it is intended thereby to make a distinction between such goods as in dealings betwixt merchants and customers are, or shall ever hereafter be, actually *counted*, and such as are not. The expression is a general formula applicable, according to popular import, to all cases that it will solve, and so applied will obviously draw the proper distinctions betwixt higher and lower stages of manufactures and higher and lower priced goods. In Maillard *vs.* Lawrence, 16 Howard, 251, this court said: "The popular or received

import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions." See also Greenleaf vs. Goodrich, 101 U. S., 284.

As for the objection that the number of threads in a square inch of "cotton Italians" cannot be discovered by applying a glass, but only after unraveling, the answer seems to be: 1st, that the statute makes no specification as to *method* of ascertainment; and, 2d, that the variation in question appears to arise from the circumstance that the goods are *twilled;* and that it is plain upon the face of Schedule A that the legislature regards twilled goods as being *countable* Jeans, bed-tickings, &c., therein enumerated are twilled goods, so that it is plain that twilled goods, except so far as actually accepted, are within the first three paragraphs of such schedule, and therefore are to be regarded as *countable* goods.

2. As to the first request by the plaintiff in error for instructions, it seems enough to say that a court cannot be called upon to recognize *Heyl's Digest* as containing law. Meaning no disparagement to that useful book, it seems to be quite enough to require courts at *nisi prius* to recognize the law when called to their attention *in authorized publications.* I submit, therefore, that the court below could not be required to instruct the jury as it was in the first request desired.

But if this be not so, then *exceptio probat regulam;* that is, the circumstance already mentioned, that the exception to paragraph 1, in Schedule A, which speaks of other than *plain woven* goods (viz: "jeans, denims, drillings, bed-tickings, ginghams, plaids, cottonades, pantaloon stuff, and goods of like description"), shows that *the body* of the paragraph includes all cotton goods, plain woven or other, that are not within the exception; it being "conceded" (folio 24) that these goods are not within the exception.

3, 4, and 5. I understand that the other assignments are not pressed except so far as included in the above.

Something was said below as to *black* and *white* not being *colors.* I understand the learned gentlemen who appear in this court to waive that point, or otherwise it would be interesting to hear reasons assigned for holding, amongst other things, that the word "color" in the recent much-discussed amendments protects all other men amongst us but whites and blacks!

S. F. PHILLIPS,
Solicitor-General.

APPENDIX.

SCHEDULE A.—COTTON AND COTTON GOODS.

1. SEC. 2504. On all manufactures of cotton (except jeans, denims, drillings, bed-tickings, ginghams, plaids, cottonades, pantaloon stuff, and goods of like description) not bleached, colored, stained, painted, or printed, and not exceeding one hundred threads to the square inch, counting the warp and filling, and exceeding in weight five ounces per square yard, five cents per square yard; if bleached, five cents and a half per square yard; if colored, stained, painted, or printed, five cents and a half per square yard, and, in addition thereto, ten per centum ad valorem.

2. On finer and lighter goods of like description, not exceeding two hundred threads to the square inch, counting the warp and filling, unbleached, five cents per square yard; if bleached, five and a half cents per square yard; if colored, stained, painted, or printed, five and a half cents per square yard, and, in addition thereto, twenty per centum ad valorem.

3. On goods of like description, exceeding two hundred threads to the square inch, counting the warp and filling, unbleached, five cents per square yard; if bleached, five and a half cents per square yard; if colored, stained, painted, or printed, five and a half cents per square yard, and, in addition thereto, twenty per centum ad valorem.

4. On cotton jeans, denims, drillings, bed-tickings, ginghams, plaids, cottonades, pantaloon stuffs, and goods of like description, or for similar use, if unbleached, and not exceeding one hundred threads to the square inch, counting the warp and filling, and exceeding five ounces to the square yard, six cents per square yard; if bleached, six cents and a half per square yard; if colored, stained, painted, or printed, six cents and a half per square yard, and, in addition thereto, ten per centum ad valorem.

5. On finer or lighter goods of like description, not ex-

ceeding two hundred threads to the square inch, counting the warp and filling, if unbleached, six cents per square yard; if bleached, six and a half cents per square yard; if colored, stained, painted, or printed, six and a half cents per square yard, and, in addition thereto, fifteen per centum ad valorem.

6. On goods of lighter description, exceeding two hundred threads to the square inch, counting the warp and filling, if unbleached, seven cents per square yard; if bleached, seven and a half cents per square yard; if colored, stained, painted, or printed, seven and a half cents per square yard, and, in addition thereto, fifteen per centum ad valorem: *Provided*, That upon all plain woven cotton goods, not included in the foregoing schedule, unbleached, valued at over sixteen cents per square yard; bleached, valued at over twenty cents per square yard; colored, valued at over twenty-five cents per square yard, and cotton jeans, denims, and drillings, unbleached, valued at over twenty cents per square yard, and all other cotton goods of every description, the value of which shall exceed twenty-five cents per square yard, there shall be levied, collected, and paid a duty of thirty-five per centum ad valorem: *And provided further*, That no cotton goods having more than two hundred threads to the square inch, counting the warp and filling, shall be admitted to a less rate of duty than is provided for goods which are of that number of threads.

7. Cotton thread, yarn, warps, or warp-yarn, not wound upon spools, whether single or advanced beyond the condition of single by twisting two or more single yarns together, whether on beams or in bundles, skeins, or cops, or in any other form, valued at not exceeding forty cents per pound, ten cents per pound; valued at over forty cents per pound and not exceeding sixty cents per pound, twenty cents per pound; valued at over sixty cents per pound and not exceeding eighty cents per pound, thirty cents per pound; valued at over eighty cents per pound, forty cents per pound; and, in addition to such rates of duty, twenty per centum ad valorem.

8. Spool-thread of cotton, six cents per dozen spools, containing on each spool not exceeding one hundred yards of thread, and, in addition thereto, thirty per centum ad valorem; exceeding one hundred yards for every additional hundred yards of thread on each spool or fractional part thereof, in excess of one hundred yards, six cents per dozen, and thirty-five per centum ad valorem.

9. Cotton cords, gimps, and galloons, and cotton laces colored, thirty-five per centum ad valorem.

10. Cotton shirts and drawers, woven or made on frames, and on all cotton hosiery, thirty-five per centum ad valorem.

11. Cotton-velvet, thirty-five per centum ad valorem.

12. Cotton braids, insertings, lace, trimming, or bobbinet, and all other manufactures of cotton, not otherwise provided for, thirty-five per centum ad valorem.

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Supreme Court of the United States,

OCTOBER TERM, 1883.

NEWMAN
v.
ARTHUR.
No. 76.

Plaintiff's Reply Brief.

The *fact*, admitted to exist by both parties (otherwise the question would have been submitted to the jury, 101 U. S., 284)—is that plaintiff's goods are *not* "of like description" to denims, jeans, etc. (Record, 10, fols. 24 and 25).

In *the one particular* [*i. e.*, that of being non-countable, because twilled] which led to taking denims, etc., by the excepting clause out from the paragraph wrongly (as we say) applied to our goods, these importations *are* like denims and the other excepted goods; though, as a dutiable article, *not* "of like description;" differing in every respect except the common characteristic of being twilled, which, as the Solicitor-General observes, they both possess.

Because, like jeans, etc., they are non-countable (without destroying part of the fabric, by unravelling), they do not come within the paragraphs applied by the Collector, defendant.

Because not "of like description," they are not dutiable (as the Solicitor-General suggested they might be) as denims and jeans are.

Hence, not being within either of these descriptive clauses, they must fall within the *omnium gatherum* clause which concludes the cotton division of Schedule A, and which was intended to cover future manufactures of that staple, not like anything known to exist when the law was passed.

EDWIN B. SMITH,
Of Counsel for the Plaintiff.